

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WILLIAM HOWELL,

Plaintiff,

-vs-

16-CV-6117

CORRECTIONAL MEDICAL CARE, INC., et al,

Defendants.

Proceedings held before the
Honorable Marian W. Payson, Kenneth B.
Keating Courthouse, 100 State Street,
Rochester, New York, on September 20,
2017.

APPEARANCES:

MARIA DYSON, ESQ.,
Appearing for Plaintiff.

NANCY QUINN KOBA, ESQ.
Appearing telephonically for
Shahid Ali, N.P.

JAMES H. COSGRIFF III, ESQ.,
Appearing for remaining Defendants.

AUDIO RECORDER: Catherine A. Marr

TRANSCRIBER: Michelle L. McLaughlin, RPR,
Court Reporter,
716/332-3560

(Proceedings recorded by electronic sound
recording, transcript produced by computer.)

1 THE COURT: Good afternoon. Please be
2 seated.

3 THE CLERK: William Howell versus
4 Correctional Medical Care, 16-CV-6117.

5 THE COURT: Okay. Would counsel note
6 their appearances for the record? For plaintiff?

7 MS. DYSON: Maria Dyson of the Law Offices
8 of Elmer Robert Keach III, P.C., on behalf of the
9 plaintiff William Howell.

10 THE COURT: All right. Miss Dyson.
11 For defendants?

12 MR. COSGRIFF: James Cosgriff for the
13 medical defendants and the county defendants except
14 defendant Ali and Betsy Teller.

15 THE COURT: Okay. Mr. Cosgriff.

16 And then we have on the phone for -- is it
17 Nurse Practitioner Ali, we have Miss Koba?

18 MS. KOB: Yes, your Honor.

19 THE COURT: And that's Nancy Koba,
20 K-O-B-A?

21 MS. KOB: Correct.

22 THE COURT: Okay. All right. Good
23 afternoon.

24 MS. KOB: Good afternoon, your Honor.

25 THE COURT: So pending before the Court is

1 a motion brought by plaintiff for the imposition of
2 sanctions as a result of noncompliance with
3 discovery requests served, as well as I would say a
4 prior motion -- excuse me, a prior order by this
5 Court compelling the production of documents.

6 Let me begin by asking Ms. Dyson whether there
7 have been any changes factually since the
8 submission of Mr. Cosgriff's opposition which was
9 at the end of July. What's happened with discovery
10 since then? And if you'd like to stand to address
11 the Court, please come to the podium so that you
12 can talk into the microphone.

13 MS. DYSON: Yes, your Honor.

14 THE COURT: Okay.

15 MS. DYSON: Your Honor, since the -- since
16 we filed the motion for sanctions, we have received
17 responses from the defendants. However we maintain
18 that these responses are woefully deficient.

19 THE COURT: Pull the microphone -- yeah.

20 MS. DYSON: Should I start over?

21 THE COURT: No.

22 MS. DYSON: Okay. These responses were
23 woefully deficient as it relates to the document
24 demands. We finally received a copy -- a full copy
25 of Mr. Howell's medical records. But beyond the

1 medical records and in agreement between a nurse
2 practitioner, we have not received any documents
3 from the defendants. They are -- responses to our
4 document demands indicated that CMC or Correctional
5 Medical Care did not have documents responsive to
6 the request, but the County of Monroe might have
7 it. And that was the answer to almost all of our
8 document requests. And to date we have not
9 received any supplemental responses or documents
10 responsive to this request.

11 And as it relates to our interrogatory demands
12 which were very specific, we asked questions like
13 who were the people responsible for making specific
14 decisions as it relates to the treatment that was
15 provided to the plaintiff, we received almost
16 identical responses to each interrogatory demand.
17 And those responses indicated that they were vague,
18 that they were --

19 THE COURT: Okay. Are we talking about
20 the same interrogatory responses that existed at
21 the time the motion was fully briefed?

22 MS. DYSON: Yes, your Honor.

23 THE COURT: Okay. So in that respect
24 there was no change. That was my question, has
25 anything changed since the motion was fully

1 submitted. You have the interrogatory responses
2 which I've reviewed. I understand the argument
3 you're making with respect to the responses. You
4 haven't received any supplemental responses to the
5 interrogatories?

6 MS. DYSON: No, your Honor.

7 THE COURT: Okay. And -- all right. So
8 with respect to documents, you've gotten medical --
9 the plaintiff's medical record?

10 MS. DYSON: Yes.

11 THE COURT: Okay. And you've gotten --
12 when you say an agreement --

13 MS. DYSON: It's some type of contractual
14 agreement between -- I believe it's defendant Ali,
15 who is a nurse practitioner, and Correctional
16 Medical Care.

17 THE COURT: Okay. Did you get that from
18 Ali or from CMC?

19 MS. DYSON: My understanding it was from
20 CMC.

21 THE COURT: Okay. All right. Have you
22 had any -- has your side had any conversations with
23 Mr. Cosgriff about any of the documents that have
24 been not been produced?

25 MS. DYSON: Other than the communications

1 that were attached for your Honor with the motion
2 for sanctions, which included emails asking for the
3 defendants to supplement their responses, there's
4 been -- I don't believe that there's been any
5 further communication.

6 THE COURT: Okay. Thank you.

7 Mr. Cosgriff, why don't you come on up.

8 MR. COSGRIFF: Good afternoon, your Honor.

9 THE COURT: Good afternoon.

10 MR. COSGRIFF: Okay.

11 THE COURT: So, let's start with the
12 document demands. Do you represent Monroe County
13 as well as CMC?

14 MR. COSGRIFF: I do, your Honor.

15 THE COURT: Okay. So --

16 MR. COSGRIFF: And I am awaiting some
17 additional documents from Monroe County. With
18 respect to the other responses that I did provide,
19 we do not have many of the things that were
20 requested. Some of the documents that were
21 requested I did object to in my responses because
22 they went to personal tax returns for some of the
23 named defendants. And in addition to that, they
24 went back a 12-year period. So I did note my
25 objection in my responses to those.

1 But to date, your Honor -- and I apologize to
2 counsel and to the Court to begin with for my
3 tardiness in getting these things out. But at this
4 point we have responded to the best of our ability
5 pending what I can get, if anything, from the
6 county, as to whether or not they have any
7 documentation.

8 THE COURT: Okay. And what is -- what
9 argument do you have other than mea culpa for not
10 having produced the documents certainly in
11 compliance with a court order issued in response to
12 a prior motion to compel requiring you to produce
13 those documents which were belated at the time of
14 the prior motion to compel by July 7th?

15 MR. COSGRIFF: Well, other than waiting
16 for additional documentation from the county, we do
17 not have anything further to provide.

18 THE COURT: Well, you represent the
19 county.

20 MR. COSGRIFF: I do.

21 THE COURT: Okay. So waiting for
22 documents from the county is not an adequate
23 response. If you're waiting for documents from the
24 county, the county is your client. They're your
25 documents. They have to be produced. They should

1 have been produced -- these document requests were
2 served in July of 2016, over a year ago. They were
3 the subject of a motion to compel brought
4 April 27th of 2017. I issued a motion scheduling
5 order. There was no response by defendants in
6 the -- noting the failure to oppose, I granted what
7 was a previous motion to compel June 16th and
8 ordered those documents to be produced by July 7th.
9 So it seems like it is months, if not over a year
10 too late to say they're getting them.

11 MR. COSGRIFF: Well, I thought -- and
12 again it goes to me. I thought the medical
13 defendants would have had policies and procedures
14 from the jail. They do have an agreement with the
15 county to provide the medical services. And I
16 assumed that policy and procedures for that would
17 have been part of the agreement and part of the
18 file that the medical defendants would have had.

19 THE COURT: All right. So you're saying
20 that you thought -- if I'm understanding you
21 correctly, you thought it was going to be easier
22 than it was to get those documents because you
23 thought they would be within the custody, control
24 of CMC and easier to produce than it, in fact, has
25 turned out to be?

1 MR. COSGRIFF: That -- that's what I
2 thought it was going to be, your Honor.

3 THE COURT: Okay.

4 MS. DYSON: Your Honor, if I may be heard
5 on one point?

6 THE COURT: I'm not -- I'm not done
7 thinking about what Mr. Cosgriff has said.

8 All right. So, yeah, I think the -- the issue
9 that I'd like to know from you, Miss Dyson, and if
10 there's anything else you want to say, you can do
11 that as to this issue of documents, what's the
12 relevance of tax returns for individual defendants?
13 That seems a bit unusual.

14 MS. DYSON: Your Honor, I would -- this
15 issue has been addressed by other courts in which
16 we have litigation against Correctional Medical
17 Care. And the way that those courts have resolved
18 our requests for financial information is they have
19 not allowed us to get tax returns, but they have
20 allowed us to get certain type of financial
21 documents that help us prove our Monell claim. So
22 to --

23 THE COURT: In what respect do those
24 documents help you prove a Monell claim?

25 MS. DYSON: One of the documents we've

1 been able to obtain are annual profit statements,
2 and we're able to compare those to the requests for
3 proposals that are submitted to the county by CMC.
4 And what we're able to show is CMC's representation
5 to various counties in which they have contracts
6 about the profit margin that they're going to have
7 is incorrect. Oftentimes it will be five to ten
8 times higher, and the way we've --

9 THE COURT: Okay. But that has nothing to
10 do with individual defendants, right? That has to
11 do with CMC the entity, right?

12 MS. DYSON: Yes, your Honor.

13 THE COURT: Okay. So just stay with me
14 with respect to -- Mr. Cosgriff is telling me that
15 the documents that you were requesting -- and I
16 know I have a copy of the request for production of
17 documents include individual -- tax returns for the
18 individual defendants, is that what you're saying?

19 MR. COSGRIFF: That's correct, your Honor.

20 THE COURT: Okay. And show me -- tell me
21 what request that is.

22 MR. COSGRIFF: On the document demand
23 specifically document 18, documents reflecting
24 salary and profits paid to the personal defendants
25 Umar and Carpio. And I believe there is some other

1 documentation in here. Number 17 talks about the
2 corporate tax returns.

3 THE COURT: Okay. I'm not requiring that
4 any tax returns for any of the individual
5 defendants be produced to the extent that any of
6 these requests could be read to include those. And
7 I don't know that we need to go through them and go
8 through that exercise. It doesn't seem to be
9 something that plaintiff is pressing, but, in any
10 event, I don't think in a case like this I would
11 find really under any argument that I can think of
12 that there would be a justification for turning
13 over individual tax returns. So you don't need to
14 read them to include that.

15 With respect to CMC, Miss Dyson, are you
16 agreeable to talking with Mr. Cosgriff about the
17 case law that you're referencing and conferring
18 with him as to the particular financial information
19 as to CMC that you're looking for and that you
20 believe has been upheld by other cases?

21 MS. DYSON: Yes, your Honor.

22 THE COURT: Okay. So I'm going to direct
23 that you have that conferral, okay?

24 MR. COSGRIFF: Very well.

25 THE COURT: Now with respect to the

1 remainder of the -- is there something else you
2 wanted to say? Or is that the issue you wanted to
3 raise?

4 MS. DYSON: There was one issue that was
5 raised by Mr. Cosgriff that -- and I have no doubt
6 that this is what's been reported to him by his
7 clients. But I know from other litigation with or
8 against CMC that there are a range of documents
9 that are maintained by Correctional Medical Care,
10 including documents relating to the Attorney
11 General investigation and the audits that have been
12 conducted at the direction by the Attorney General.
13 And also there's various investigations that are
14 triggered when there's a lawsuit filed, and
15 including medical audit committees that meet,
16 quality care, audit committees that meet, and these
17 are documents that we have been able to obtain in
18 other litigation and we believe exist here. And I
19 believe that Mr. Cosgriff should talk to his client
20 and find out whether or not Correctional Medical
21 Care has these documents, because it has existed in
22 all of our other cases against CMC.

23 THE COURT: Well, that certainly seems to
24 be a fair observation. This is what I'm going to
25 do with respect to the document request. They have

1 been subject to a prior motion to compel. And they
2 should not be subject to another motion for
3 sanctions, let alone the first motion to compel. I
4 appreciate Mr. Cosgriff's affidavit indicates that
5 he's not been subject to a motion for sanctions in
6 his professional life. But this seems to me, two
7 essentially in the span of a couple of months is --
8 is certainly not -- not a trend that anybody wants
9 to -- wants to continue.

10 The record certainly justifies a finding that
11 defendants' objections to production of documents
12 have been waived, I would say with the exception of
13 the individual tax returns. I think they are of
14 such heightened sensitivity, and there's nothing
15 here that indicates that those individual
16 defendants have themselves been responsible for any
17 delay in turning over the documents. So I don't
18 think they should be penalized by
19 over-interpreting, number one, the document request
20 to request them, and then, number two, to find that
21 they've been waived. I think they are sensitive
22 enough, their relevance is very attenuated. So I'm
23 not going to require those.

24 I am going to give the defendants one more
25 month to produce documents. If the documents are

1 not produced by that deadline, they -- that
2 noncompliance, dereliction of duty, will likely
3 give rise to more serious sanctions. And I'm not
4 done with the sanctions here. But my main focus is
5 in getting those documents produced.

6 The allegations in this case are serious
7 allegations. That is not any opinion as to the
8 ultimate merits of the case, but I have -- I read
9 the complaint, and the allegations are certainly
10 serious allegations, and the plaintiff is on firm
11 footing to ask for the Court's assistance in
12 ensuring that discovery moves along in the manner
13 it should move along.

14 So, the documents need to be produced. They
15 need to be produced whether they are in the
16 custody, control of CMC or the County of Monroe.

17 Mr. Cosgriff, you represent both of them. You
18 know, that said, it behooves both of you, if there
19 is a reasonable question as to what the plaintiff
20 is looking for here as to particular documents, to
21 talk, you know, both to talk about -- Mr. Cosgriff,
22 what you may be hearing from your client about
23 there -- the fact that they don't have certain
24 documents that Miss Dyson believes based on her
25 experience in other litigation doesn't seem quite

1 right, you should talk about that. Because
2 ultimately having that dialogue I hope will
3 facilitate finding the documents more quickly and
4 getting them produced.

5 I don't think it is in anybody's interest,
6 including the plaintiff, to be given truckloads of
7 documents that arguably fall within the broadest
8 reading of any particular document request. I
9 think to the extent that there's a question about
10 what is sought here, you should confer, have a
11 dialogue about, you know, what particular document
12 you're looking for, so you're not coming back to me
13 with a dispute because Mr. Cosgriff either didn't
14 give you something that you thought should have
15 been turned over, or he gave you too much and it's
16 too difficult for you to find what you're looking
17 for. So, I still think that there is value to be
18 served by a conferral, although I recognize as a
19 legal matter that objections have, as a legal
20 matter, been waived. But it is still in everyone's
21 interest to move this case forward as efficiently
22 as possible. By identifying the documents that
23 you're looking for, it's going to be easier to find
24 them, it's going to be easier to turn them over,
25 and it's going to be easier for you to work with

1 them in a way that's helpful to the case.

2 So you should have that conferral. I think you
3 ought to have that conferral -- today is Wednesday.
4 You should have that conferral by no later than
5 next Tuesday, because I think that is going to help
6 Mr. Cosgriff.

7 Mr. Cosgriff, I'm giving you 30 days from
8 today. Today is the 20th, right? So I'm going to
9 say October 20th -- Friday, October 20th, is the
10 date set by this Court order for production of
11 those documents that still need to be produced.
12 Failure to comply with that order will result --
13 very likely to result in more serious sanctions.

14 MS. DYSON: Your Honor, if I may have a
15 small indulgence from the Court? I'm finally
16 taking a vacation in a very long time over the next
17 couple days. I get back on Monday. If I could
18 have until Wednesday to put together -- I'd like to
19 put together a packet of sample documents that
20 we've received in other litigation to help Mr.
21 Cosgriff identify what we're looking for, as well
22 as a list of what I'm looking for.

23 THE COURT: Sure. Why don't we do this.
24 You'll confer by no later than Friday of next week.
25 That gives you time to put together a packet of

1 documents. It gives Mr. Cosgriff some time to look
2 at it. You'll confer by the 29th. And I'm going
3 to set October 27th instead of the 20th as the date
4 for document production.

5 All right. Let's talk about interrogatories.
6 I've reviewed the interrogatory responses and --
7 well, the first question I want to ask is when were
8 the interrogatories served? I have a copy of the
9 defendants' answers. I don't have a copy of the
10 original interrogatories to know when they were
11 served.

12 MS. DYSON: I have the original
13 interrogatories, and the date that I completed
14 them. Usually the way it happens in our office is
15 we serve it electronically on the date that we sign
16 it and then send it out by regular mail. I just
17 don't have the date that they were actually served
18 on the defendant. But the date on these
19 interrogatories are July 15th, 2016.

20 THE COURT: Okay. So we're talking about
21 something that's about the same date as the
22 document request.

23 MS. DYSON: Yes, your Honor.

24 THE COURT: Okay. So, I've looked at the
25 interrogatory requests and I've looked at the

1 interrogatory responses. I don't intend to go
2 through every interrogatory that has been asked,
3 although I think generally the interrogatories seem
4 to be appropriate interrogatories. A number of the
5 manner of the objections I noted, in my view, are
6 really not appropriate objections to an
7 interrogatory, such as the information is better
8 obtained at a deposition. I mean, certainly that's
9 something that -- that the parties can discuss at
10 an informal conferral. There could be, I guess, a
11 motion for a protective order filed by somebody
12 responding setting forth why responding to an
13 interrogatory would be unduly burdensome.

14 I would say, you know, oftentimes getting
15 information through an interrogatory is actually
16 helpful before a deposition rather than the other
17 way around. So that -- that response is not --
18 certainly not a legal basis to resist responding to
19 an interrogatory. There isn't any law that now
20 prohibits contention interrogatories, even if I
21 were to agree that some of these interrogatories
22 are, in fact, contention interrogatories, and I'm
23 not sure I agree with that, but there's no legal
24 bar on contention interrogatories.

25 But again, beyond that, the objections have

1 been waived. They are untimely. They were
2 responded to in June of 2017. So, I mean, unless
3 there's something I'm missing about the timing, it
4 seems as if we're dealing with something that --
5 that at best fell through the cracks for a long
6 period of time. So, the interrogatories need to be
7 responded to, you know, and as best you are able
8 and the rules require that they be responded to
9 after a diligent inquiry to put the party in a
10 position of responding to the interrogatories. So
11 you can't simply say, you know, I don't know, or so
12 and so doesn't know the answer to that if there is
13 information that's reasonably accessible to that
14 individual, which would -- or party which would
15 enable them to answer the interrogatories.

16 Again, looking through these interrogatories,
17 they don't seem like they are out of line, and I
18 think they need to be responded to. So, we'll set
19 the same date for responses to interrogatories,
20 October 27th.

21 You know, I want -- I want to be clear if --
22 that I am requiring the parties to confer about
23 these document requests and the interrogatories in
24 an effort to just to try to make things as easy for
25 the parties to get the discovery completed.

1 So, Miss Dyson, if there's something -- if you
2 can have a conversation with Mr. Cosgriff which you
3 can say as to this interrogatory, you know, this is
4 really what we're looking for, or, Mr. Cosgriff, if
5 you have a question about what they're looking for,
6 have that conversation, because I think that might
7 put you in a position of being better able to
8 answer the interrogatory, provide the information
9 that is being requested, and avoid future disputes
10 as to whether the response is adequate or not. But
11 you can't simply say, unless there is agreement by
12 plaintiff's counsel, we're going to address this at
13 a deposition. You've waived your right to make
14 that argument. So I think you're going to have to
15 answer the interrogatories consistent with your
16 obligation to make a --

17 MR. COSGRIFF: Understood.

18 THE COURT: -- diligent inquiry. And I am
19 imposing a financial sanction that is the --
20 requiring the defendants to reimburse plaintiff's
21 counsel for the costs of this motion. This motion
22 should not have needed to have been made. And I'm
23 not -- I'm not doing anything more than that. So,
24 let's -- other judges might have taken a more, I
25 think, hardline approach to this, and perhaps would

1 have imposed other sanctions. But there's broad
2 discretion in this area.

3 Mr. Cosgriff, I have no reason to question your
4 representation that this is very unusual for you.
5 You've been practicing a long time. And my main
6 interest is let's get that information provided.
7 Let's move the case along. It is serious
8 allegations. To the extent that you're not getting
9 the attention that you need from the folks at
10 Monroe County, you just need to let them know that
11 there are going to be consequences if the documents
12 are not produced or the interrogatory responses not
13 made in a timely manner that are likely to have an
14 effect on their ability to defend against this
15 litigation in some -- in some fashion, either some
16 instruction that is given to the jury or, you know,
17 the striking of an answer, I don't want to get
18 there. I'm sure your clients don't either.

19 So, with respect to those attorney's fees and
20 costs, it's not uncommon that I impose that
21 sanction on a record like this. And these issues
22 do come up from time to time. Rather than my
23 inviting litigation on it, or, you know,
24 determining a fee now, what I have found usually
25 works is to say I want you all to confer on that.

1 And, Miss Dyson, I want you to -- to let
2 Mr. Cosgriff know what your fees and costs are
3 associated with the motion. And I'm talking about
4 this motion. I'm not talking about the last
5 motion. Sometimes people find a way of throwing a
6 lot of other things that happen because they happen
7 during the same chronological period. I'm talking
8 about the fees and costs associated with drafting
9 this motion and appearing today for the motion.
10 You all should talk about what a -- you know,
11 calculate that. If there's some basis then to have
12 further discussions about that figure, you can do
13 that. And if you have not been able to reach an
14 agreement, and I hope that you are, then I would
15 say by that same date, October 27th, Miss Dyson,
16 you can submit to me an affidavit with whatever
17 billing records you need to submit to establish
18 your fees and costs, and I will determine the
19 amount if you can't reach an agreement. But I find
20 usually people are able to work that out without
21 the Court having to get involved with that. Okay?

22 MS. DYSON: Yes, your Honor.

23 THE COURT: Okay.

24 MR. COSGRIFF: Thank you, your Honor.

25 THE COURT: Mr. Cosgriff, anything else?

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MR. COSGRIFF: Nothing further.

THE COURT: Okay. Thank you very much.

MS. DYSON: Thank you, your Honor.

* * * * *

CERTIFICATION

I certify that the foregoing is a
correct transcription, to the best of my
ability, from the electronic sound recording
of the proceedings in this matter.

s/Michelle L. McLaughlin
Michelle L. McLaughlin, RPR
Court Reporter